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700 13th Street, NW  
Suite 600  
Washington, D.C. 20005-3960

① +1.202.654.6200  
② +1.202.654.6211  
PerkinsCoie.com

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December 16, 2016

OFFICE OF GENERAL  
COUNSEL

Jeff S. Jordan  
Assistant General Counsel  
Complaints Examination & Legal Administration  
Federal Election Commission  
Attn: Donna Rawls, Paralegal  
999 E. Street, NW  
Washington, DC 20463

Marc Erik Elias  
Ezra W. Reese  
MElias@perkinscoie.com  
D. +1.202.434.1609  
F. +1.202.434.9126

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Re: MUR 7157

Dear Mr. Jordan:

We write as counsel to Americans United for Change ("AUFC") in response to the complaint filed by Project Veritas Action Fund and James O'Keefe III ("Complainants") on October 20, 2016 (the "Complaint"). The Complaint fails to set forth sufficient facts which, if proven true, would constitute a violation of the Federal Election Campaign Act of 1971, as amended ("the Act").<sup>1</sup> Because the Complaint fails to provide sufficient facts to demonstrate that AUFC violated the law, we request that the Commission dismiss the Complaint with respect to AUFC.

### Background

"The Commission may find 'reason to believe' only if a complaint sets forth sufficient specific facts, which, if proven true, would constitute a violation of the [Act]."<sup>2</sup> Moreover, unwarranted legal conclusions from asserted facts or mere speculation will not be accepted as true, and will provide no independent basis for investigation.<sup>3</sup> Here, the Complaint's primary support for the speculative conclusion that AUFC must have engaged in impermissible coordination with Hillary for America ("HFA") and the Democratic National Committee ("DNC") is a homemade "transcript" of conversations cobbled together by Complainants in which AUFC is sporadically mentioned by Scott Foval of The Foval Group, a one-time consultant of AUFC. These remarks appear to be taken out of context and conveniently pieced together in a manner that serves Complainant's purpose of alleging that a violation of the Act has occurred. Furthermore, the comments in the "transcript" are not substantiated by any other source, and their credibility is very much in question.

<sup>1</sup> See 11 C.F.R. § 111.4(d)(3).

<sup>2</sup> FEC Matter Under Review 4960 (Clinton for U.S. Exploratory Committee), Statement of Reasons of Commissioners David M. Mason, Karl J. Sandstrom, Bradley A. Smith, and Scott E. Thomas at 1 (Dec. 21, 2000).

<sup>3</sup> See 11 C.F.R. § 111.4(d)(3).

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Relying upon this "transcript," Complainants broadly allege that AUFC has made coordinated expenditures constituting in-kind contributions to HFA and the DNC that violate the Act's source and amount restrictions. Scott Foval's remarks do not represent AUFC, nor have they been verified by credible sources. Rather, Complainants lean heavily on their homemade "transcript" to make sweeping allegations that AUFC has violated the Act through the following activities:

- Operating the "Donald Ducks" mascot and campaign;<sup>4</sup>
- Activity broadly described in the Complaint as "outside group shared messaging."<sup>5</sup>

The Complaint fails to offer any specific facts to demonstrate that much of this activity ever occurred or that AUFC was involved in the activity. Furthermore, the activities described in the Complaint are not in-kind contributions to HFA or the DNC because neither the content prong nor the payment prong is satisfied under the Commission's test for coordinated communications.

#### Legal Analysis

1. **Federal campaign finance laws do not prohibit coordination on communications other than "public communications," and the Complaint fails to allege that AUFC coordinated with HFA or the DNC on public communications.**

Federal law treats a coordinated communication as an in-kind contribution to a campaign.<sup>6</sup> Whether a communication qualifies as an in-kind contribution is regulated under 11 C.F.R. § 109.21.<sup>7</sup>

Under this regulation, a communication is a coordinated communication if it meets three prongs: first, it is paid for by a person other than the candidate, authorized committee, or political party; second, it satisfies or more content standards; and third, it satisfies one of several conduct standards.<sup>8</sup>

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<sup>4</sup> Complaint at ¶ 21(a).

<sup>5</sup> *Id.* ¶ 21(b).

<sup>6</sup> See 52 U.S.C. § 30101(8)(A); 11 C.F.R. § 109.20.

<sup>7</sup> See FEC Matter Under Review 5564 (Alaska Democratic Party), Statement of Reasons of Commissioner Lenhard (Dec. 31, 2007); see also FEC Matter Under Review 6722 (House Majority PAC), First General Counsel's Report (Aug. 6, 2013) (finding that Internet communications other than those placed for a fee on another person's website, which are not public communications, are governed by 11 C.F.R. § 109.21 and therefore cannot be contributions); FEC Matter Under Review 6657 (Akin for Senate), First General Counsel's Report (May 16, 2013) (production costs associated with online videos fall under § 109.21 and are not contributions).

<sup>8</sup> See 11 C.F.R. § 109.21.

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The content prong can be satisfied in one of five ways.<sup>9</sup> It is satisfied if the communication is an "electioneering communication," which must be publicly distributed by a television station, radio station, cable television station, or satellite system within 60 days before a general election or 30 days of a primary election.<sup>10</sup> The Complaint does not identify any communication that would qualify as an "electioneering communication."

The remaining four ways to satisfy the content prong require that the communication be a "public communication,"<sup>11</sup> which the Act defines as "a communication by means of any broadcast, cable, or satellite communication, newspaper, magazine, outdoor advertising facility, mass mailing, or telephone bank to the general public or any other form of general public political advertising."<sup>12</sup>

Because AUFC meets the conduct standard by communicating with HFA and the DNC, it takes care to limit its communications to avoid paying for a "public communication" that would qualify as an in-kind contribution to HFA or the DNC in violation of the Act's source and amount restrictions.

- a. **The activity associated with the "Donald Ducks" mascot is not a "public communication" and is therefore not an in-kind contribution to HFA or the DNC.**

None of the activity associated with AUFC's operation of the "Donald Ducks" mascot constitutes a "public communication" under the Act. For the content prong to be satisfied and an activity to be a "public communication," a communication must be made "by means of any broadcast, cable, or satellite communication, newspaper, magazine, outdoor advertising facility, mass mailing, or telephone bank to the general public or any other form of general public political advertising."<sup>13</sup>

The "Donald Ducks" activity does not fit under any of these elements of the definition of "public communication." The totality of the activity included an individual wearing a duck costume carrying hand-held signs with statements such as "Donald Ducks Releasing His Tax Returns" in locations where Trump rallies and fundraisers were held.<sup>14</sup> At times, the duck mascot was accompanied by an individual wearing a Donald Trump mask along with other individuals toting

<sup>9</sup> FEC Matter Under Review 6722 (House Majority PAC), General Counsel's Report at 4 (Aug. 6, 2013) (citing 11 C.F.R. § 109.21(c)(1)-(5)).

<sup>10</sup> See *id.* (citing 11 C.F.R. §§ 109.21(c)(1), 100.29(a), (b)(1)).

<sup>11</sup> *Id.* (citing 11 C.F.R. § 109.21(c)(2)-(5)).

<sup>12</sup> 52 U.S.C. § 30101(22).

<sup>13</sup> *Id.*

<sup>14</sup> See Complaint, Exhibit B.

hand-held signs bearing anti-Trump language.<sup>15</sup> This activity is clearly not a communication made via broadcast, cable, satellite, newspaper, magazine, outdoor advertising facility, mass mailing, or telephone bank.

If the Commission found that this activity did constitute a "public communication" because it was "general public political advertising," that finding would have drastic implications for the scope of the Commission's disclaimer regulations. The Act requires disclaimers for "public communications" that expressly advocate the election or defeat of a clearly identified candidate.<sup>16</sup> There is no monetary threshold below which a public communication does not need a disclaimer. If the Commission ruled that a single sign constituted a "public communication," that would require every individual political sign expressly advocating for or against a candidate at a protest or political rally, even if hand-made, to include a disclaimer in a text box noting who paid for it, and for independent activity the inclusion of a street address, telephone number or website URL and a statement that the sign was not coordinated. This result is nonsensical and unenforceable.

For reasons set forth above, the "Donald Ducks" activity is not "public communication" and is therefore not an in-kind contribution to HFA or the DNC.<sup>17</sup>

- b. The Complaint does not allege any specific facts to demonstrate that "outside group shared messaging" led to the development of "public communications" constituting in-kind contributions to HFA or the DNC.**

To support their claim that AUFC engaged in broadly in "public communications" Complainants use sweeping references to "outside group shared messaging," or "third-party groups engag[ing] in the production of public communications that referenced candidates for presidential office."<sup>18</sup> However, Complainants fail to point to any specific activity engaged in by AUFC that constitutes a "public communication" under the Act.

First, the Complaint notes that the transcript of the recorded conversations with Scott Foval includes "multiple references to deploying individuals in Trump fundraisers and rallies to disrupt

<sup>15</sup> Complaint at Exhibit B.

<sup>16</sup> See 11 C.F.R. § 110.11(a)(2).

<sup>17</sup> The Commission's Office of General Counsel has consistently recommended dismissal of complaints alleging that communications other than "public communications" sponsored by third parties were illegal contributions. *See, e.g.*, FEC Matter Under Review 6477 (Right Turn USA), First General Counsel's Report (Dec. 27, 2011); FEC Matter Under Review 6522 (Lisa Wilson-Foley for Congress), First General Counsel's Report (Feb. 5, 2013); FEC Matter Under Review 6657 (Akin for Senate), First General Counsel's Report (Sept. 17, 2013); FEC Matter Under Review 6722 (House Majority PAC), First General Counsel's Report (Aug. 6, 2013). In each of these cases, the Commission has unanimously voted to dismiss the complaints.

<sup>18</sup> Complaint at ¶ 21(b).

them."<sup>19</sup> It also claims that individuals attending these protests held signs that read "#DumpTrump," "No Hate, No Racism, No Trump," or "Nope" with a picture of Trump.<sup>20</sup> However, the complaint does not allege that AUFC paid for these specific signs or had any role whatsoever in creating them.<sup>21</sup> Individuals bearing signs at a protest, acting in their own capacity, are not engaged in a "public communication" as that term is defined by the Act, and their activity is protect under the First Amendment.<sup>22</sup> Second, the Complaint offers no evidence to support the claim that AUFC was involved in any specific protest activity or directed anyone else to engage in it. Instead, Complainants cite to ambiguous references in the transcript to unspecified political activity by "numerous third-party groups" and allude to plans to "have third-party groups launch protests at political events" without naming a specific group that is responsible.<sup>23</sup> Any particular organization's role in this ill-defined activity is speculative at best.

The Commission requires much more than "mere speculation" to assert a violation of the Act.<sup>24</sup> Because the Complaint fails to allege any specific facts that would give the Commission reason to believe that any specific "public communication" resulted from collaboration among third-party groups, no violation of the Act has occurred.

- 2. The Complaint does not allege any specific facts to demonstrate that AUFC paid for the activities that Complainants claim are "public communications." Therefore, the payment prong is not satisfied and these activities are not in-kind contributions to HFA or the DNC.**

Not only does the Complaint fail to demonstrate that AUFC made a "public communication," but it also does not show that AUFC paid for any of the activities it discusses. AUFC took over the brand ownership of the campaign from the DNC, which had already fully funded the creation of the campaign. All other costs associated with the "Donald Ducks" effort (travel, signage, etc.) were separately funded by organizations other than AUFC. In fact, AUFC has declared under

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<sup>19</sup> *Id.* at ¶ 21(b)(i).

<sup>20</sup> *Id.* at ¶ 21(b)(ii).

<sup>21</sup> *Id.*

<sup>22</sup> *See, e.g.,* FEC Regulations for Internet Communications, 71 Fed. Reg. 70, 18589 (explaining that "Congress did not use the term 'public communication' to regulate the vast majority of the American public's activity on the Internet or elsewhere").

<sup>23</sup> Complaint at ¶ 18, 21(b).

<sup>24</sup> For example, in FEC Matter Under Review 5754 (MoveOn.org Voter Fund) the Commission found no reason to believe a violation had occurred because the complaint failed to connect any conversation between the parties to the advertisements in question, and thus, failed to provide "probative information of coordination." While this matter focused on the conduct prong of the test for coordination, it is equally applicable to the content prong. Here, Complainants contend that conversations occurred and that public communications were published, but fail to connect conversations among the respondents to any specific communication. *See* FEC Matter Under Review 5754, Factual and Legal Analysis Regarding Alleged Coordination of Expenditure by MoveOn.org Voter Fund with John Kerry for President, Inc.

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penalty of perjury that the organization did not pay for any expenses associated with a "Donald Ducks" costume, signs carried by the mascot, or travel costs for individuals working on the "Donald Ducks" effort.<sup>25</sup> AUFC's sole expenses associated with the effort consisted of staff time to prepare and issue press releases about the effort over the internet, along with unpaid Twitter messaging.<sup>26</sup>

The Complaint also implies that AUFC paid for other "public communications." It cites to Scott Foval's secretly-recorded comments regarding payment for unspecified activities by "organizations around the country who are allies" and references a request for a "budget" for a project that "exist[s] under Democracy Partners/AUFC."<sup>27</sup> This evidence fails to show that AUFC actually paid for *any* activity, let alone a "public communication." Instead, Complainants seem to rely on their transcript to suggest that because Foval made references to both AUFC and political activity paid for by third-party groups, AUFC must have paid for a "public communication."

Furthermore, AUFC has declared under penalty of perjury that the organization did not pay for communications referenced in the Complaint and transcript. Specifically, AUFC did not execute, and incurred no expenses for, a media campaign to demonstrate to Latinos "why they should vote against these candidates" that was allegedly proposed by Scott Foval in a September 28, 2016 e-mail to Steve Packard.<sup>28</sup> AUFC did not pay anyone to relocate to the state of Wisconsin in order to vote.<sup>29</sup> AUFC did not pay for signs carried by protesters at Trump rallies that read "#DumpTrump," "No Hate, No Racism, No Trump," or "Nope" with images of Trump.<sup>30</sup> The organization did not carry out, and incurred no expenses for, a "Fall 2016 Plan to Motivate Voters" with Voces de la Frontera Action.<sup>31</sup>

The Complaint fails to allege specific facts that would give the Commission reason to believe that AUFC paid for any specific "public communication." As the Commission has made clear,

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<sup>25</sup> See Affidavit of Americans United for Change President Brad Woodhouse, MUR 7157, Attachment A. *Contra* Complaint at ¶ 21(b).

<sup>26</sup> See Affidavit of Americans United for Change President Brad Woodhouse, MUR 7157, Attachment A. *Contra* Complaint at ¶ 21(b).

<sup>27</sup> Complaint at ¶ 26.

<sup>28</sup> See Affidavit of Americans United for Change President Brad Woodhouse, MUR 7157, Attachment A. *Contra* Complaint, Exhibit C.

<sup>29</sup> See Affidavit of Americans United for Change President Brad Woodhouse, MUR 7157, Attachment A. *Contra* Complaint at ¶ 26(b)(i).

<sup>30</sup> See Affidavit of Americans United for Change President Brad Woodhouse, MUR 7157, Attachment A. *Contra* Complaint at ¶ 26(b)(i).

<sup>31</sup> See Affidavit of Americans United for Change President Brad Woodhouse, MUR 7157, Attachment A. *Contra* Complaint, Exhibit D.

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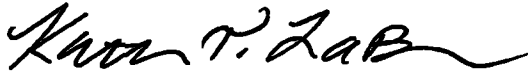
"unwarranted legal conclusions from asserted facts" or "mere speculation" are not sufficient to support a reason to believe that AUFC violated the Act.<sup>32</sup>

Because the Complaint relies on "unwarranted legal conclusions" to conclude that AUFC engaged in impermissible coordination with HFA and the DNC, there is no reason to believe that AUFC violated the Act.

#### Conclusion

For the foregoing reasons, we respectfully request that the Commission dismiss this matter and take no further action.

Very truly yours,



Marc E. Elias  
Ezra W. Reese  
Katherine T. LaBeau

Counsel to Respondents

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<sup>32</sup> FEC Matter Under Review 4960 (Clinton for U.S. Exploratory Committee), Statement of Reasons of Commissioners David M. Mason, Karl J. Sandstrom, Bradley A. Smith, and Scott E. Thomas at 1 (Dec. 21, 2000).

ATTACHMENT A

BEFORE THE  
FEDERAL ELECTION COMMISSION

IN RE

Americans United for Change, *et al.*

MUR 7157

Declaration of Brad Woodhouse

1. I am the President of the organization Americans United for Change ("AUFC").
2. AUFC did not pay for any expenses associated with a "Donald Ducks" costume, signs carried by the mascot, or travel costs for individuals working on the "Donald Ducks" effort. AUFC's sole expenses associated with the effort consisted of staff time to prepare and issue press releases about the effort over the internet, along with unpaid Twitter messaging.
3. AUFC did not pay for signs carried by protesters at Trump rallies that read "#DumpTrump," "No Hate, No Racism, No Trump," or "Nope" with images of Trump.
4. AUFC did not pay anyone to relocate to the state of Wisconsin in order to vote.
5. AUFC did not execute, and incurred no expenses for, a media campaign to demonstrate to Latinos "why they should vote against these candidates" that was allegedly proposed by Scott Foval in a September 28, 2016 e-mail to Steve Packard (Exhibit C of the Complaint).
6. AUFC did not carry out, and incurred no expenses for, a "Fall 2016 Plan to Motivate Voters" with Voces de Frontera Action (Exhibit D of the Complaint).
7. I am over 21 years of age, of sound mind, and I have personal knowledge of the facts stated above.

I declare under penalty of perjury that this declaration is true and correct..

  
Brad Woodhouse

12/15/16  
Date